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MATERIALS ON PROPERTY

PART III

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# PRO P R T Y - P A R T III

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NOTE: In the illustration last mentioned, the effect of such a conveyance, before the Statute of Uses, was to split the legal from the equitable title to the land. As far as the court of law was concerned, legal title was vested in Richard Roe who was seised in fee simple of the land. The uses declared were treated as repugnant to the legal estate created in Richard Roe and void. On the other hand, as far as the Chancellor was concerned, equitable title was vested in Robert Doe for life, and Margaret Doe in fee simple by way of equitable remainder.

The Chancellor could not directly affect legal title to the land which was vested in Richard Roe, the feoffee to uses. However, he could compel Richard Roe to deal with the land so that the cestui que use could enjoy it in accordance with the directors of John Doe, the creator of the use. This he would accomplish by ordering Richard Roe so to deal with the land on pain of a fine or imprisonment for violation of the order.

The Chancellor would enforce the uses not only against Richard Roe, the feoffee to uses, but also against the heir of the feoffee, a purchaser for value from the feoffee with notice and anyone taking a conveyance from the feoffee without giving value. It would not be enforced, however, against any person taking an interest in the land otherwise than through the feoffee, such as a lord taking by escheat on the death of the feoffee without being survived by an heir.

In the illustration in question, we have assumed that the use, trust or confidence was raised or created by express declaration on a feoffment. It could have been raised or created by express declaration on any other form of common law conveyance and on a fine. The use could be declared either at the time of or subsequent to the conveyance itself. There was no requirement that the use be declared at the time of the conveyance.

If A enfeoffed B and his heirs for value, and did not declare a use, no use would be raised. Equitable title would follow legal title and be lodged in B. If there was no consideration and no use was declared, it would be presumed by the Chancellor that B was seised of the land in law, to the use of A who would declare uses at some time subsequent to the making of the conveyance. The use in A was raised by way of resulting use.

It should be noted that if A enfeoffed B for life without value being paid, a resulting use would not be raised. The tenure which was created, was regarded as a sufficient reason for the conveyance.

The owner in fee simple of land could raise uses in other situations than those involving a conveyance of the land. He might sell to B the use of the land either for years, for life or in fee. In all cases, A would remain the owner in fee simple of the land in law. However, the Chancellor would compel A to abide by the terms of the arrangement and allow B to have the use of the land.

This transaction was technically known as a bargain and sale. The key to it was the informal agreement to allow B the use of the land in return for the payment of value. It was not necessary that the words "bargain and sell" actually be used to attract the consequences outlined above.

Finally, a use could be raised by A, the owner in fee simple covenanting to stand seised of the land to the use of a blood relation or a person connected by marriage to the covenantor. The promise was under seal, but once again no conveyance was required to raise or create the use, confidence or trust.

(See Simpson, An Introduction to the History of Land Law, c.8)



CAMPBELL v. SOVEREIGN SECURITIES & HOLDING CO. LTD.

think it is a grant. It is, of course, not a devise, not being under a will, and, in my view, it is not a conveyance, Leach v. Dennis (1864), 2<sup>1</sup>/2 U.C.Q.B. 129, although some doubts may arise from the wording of the definition of conveyance in s. 1(2) of this Act. Section 12 in my view contemplates a present or past grant, conveyance, or devise, which is not this case. Therefore, for these three reasons, in my opinion, s. 12 does not apply. We must therefore look to the position of the parties outside the statute.....

MITCHELL v. ARBLASTER, [1964-5] N.S.W.R. 119.

HARDIE, J.: - .....The argument that the beneficial gift was a joint one was based mainly on the provisions of s. 25(2) of the Conveyancing Act 1919, as amended. It was contended that the subsection had the effect of preserving, in a case such as the present, the earlier presumption in favour of joint interests. That subsection provides, *inter alia*, that subsection (1), which reverses the earlier presumption, does not apply to "persons who by the terms or by the tenor of the instrument are executors, administrators, trustees, or mortgagees". It is true that the two persons in question are executors, but they are also beneficiaries, and I am satisfied the subsection has no application to interests which they take as beneficiaries and not as executors. I am accordingly of the opinion that the gift to the two residuary beneficiaries described in the will as "Harry Mitchell and Nellie Mitchell" was not appropriate to create a joint tenancy.....

---

NOTE

Common law and equity differed in their approach to the creation of a joint tenancy and a tenancy in common. The common law leaned in favour of a joint tenancy: for reasons going back to feudal times: also because the purchase of land was facilitated; joint tenants held by one single title and this title only therefore was required to be investigated by a purchaser. But equity, acting upon the maxime that "equity is equality", disliked the right of survivorship and showed a definite inclination for a tenancy in common. As the above cases indicate whether, in a grant to two or more persons, the grantees take as joint tenants or as tenants in common depends as a general rule, upon whether the grant contains "words of severance" i.e. words which indicate that the grantees are to take separate and distinct shares. Present the four unities, a joint tenancy would be created at common law in a grant to two or more persons which did not contain words of severance. Equity, however, even in the absence of words of severance, would construe a grant as creating a tenancy in common where the intention to create such a tenancy could otherwise be presumed. Equity would so determine in three specific cases:



- (i) where money is advanced on mortgage whether in equal or in unequal shares (as to the position between the mortgagor and co-mortgagors see generally the Mortgages Act, R.S.O., 1960, ch. 245);
- (ii) where the purchase price of land is provided in unequal shares; and
- (iii) partnership land. (See generally the Partnerships Act, R.S.O., 1960, ch. 233).

For example:

In 1960 X conveyed Blackacre to "A and B". The purchase price of Blackacre was \$25,000 of which sum A contributed \$10,000 and B contributed \$15,000.

In a jurisdiction which does not have a provision similar to sec. 13 of the Conveyancing and Law of Property Act 1960 the state of the title would be:

Common Law

A and B, joint tenants.

Equity

A and B hold as tenants in common, A holding a 2/5 undivided share and B a 3/5 undivided share.

If A died in 1965:

Common Law

B would be the sole surviving joint tenant.

Equity

A's share would go under his will or on his intestacy. B would, as before, be entitled to a 3/5 undivided share.

B would hold the legal estate as a trustee, upon trust for himself and the person to whom A's interest devolved, in the shares mentioned above.

Question: What is the effect of sec. 13 on the above example?



THE LANDLORD AND TENANT ACT  
R.S.O. 1960, c. 206

...

2. The relation of landlord and tenant does not depend on <sup>Relation of</sup> ~~landlord~~ and tenant tenure, and a reversion in the lessor is not necessary in order <sup>and tenant</sup> to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor is it necessary, in order to give a landlord the right of distress, that there is an agreement for that purpose between the parties.

...

in

NOTE: A section/the form of the present section 2 was added to the Act in 1896 (see 59 Vict., c. 42, s. 3). It replaced legislation enacted in 1895 (see 53 Vict., c. 26, s. 4) which provided:

The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases where there shall be an agreement to hold land from or under another in consideration of any rent. . .

The 1895 Ontario legislation followed exactly the same wording as that found in section 3 of The Landlord and Tenant Amendment Act, Ireland, 1860, 23 and 24 Vict., c. 154, which legislation was restricted in its application to Ireland.

When the 1896 legislation was enacted it sparked comment from E. D. Armour writing in 15 Can. L.J. 245 in an article entitled The New Landlord and Tenant Act. Armour examined the purpose of the legislation applicable to Ireland and concluded (at pp. 254-5):

Our exhaustive quotations serve to show that the circumstances preceding the passing of this Act were peculiar and that the Act totally failed as a remedy. The next enquiry naturally is, what are the circumstances in Ontario that we should begin experimenting with the rejected measures designed for the ext- a-Ulster Irish. . . . The circumstances are as different from those of the Irish as are the English circumstances. In England no such law is clamoured for, none is necessary. . . . It is in short nothing but legislative vivisection - experimenting upon a living healthy body politic and economic without regard to the unfortunate subject's feelings or the ultimate effect of the experiment upon its very life.

Armour argues that the legislation provided a new basis for the law of landlord and tenant in Ontario and could effect the result of eliminating all the ordinary incidents of the landlord and tenant relationship as developed theretofore, such as the landlord's right of distress <sup>in</sup>/<sub>the</sub> absence of contract. (see e.g. ibid. at p.256).

In Harpelle v. Carroll (1895) 27 O.R. 240 the argument was put to Meredith C.J. that as the lease in question did not expressly give the lessor the right to distrain, as a result of the 1895 legislation, he could not legally distrain. Meredith C.J. rejected this argument holding:



Now the section in question does not abolish the relation of landlord and tenant, and make the bargain by which one lets land to another a mere contract, but alters the manner of creating a long existing and well-known relation; it is hereafter not to be a matter depending on tenure or service, as it was under the feudal law, nor is a reversion to be necessary to the relation, as it was after the statute Quia Emptores, but it is to be deemed to be founded on contract express or implied. It was always, I take it, necessary that in a certain sense the relation should be founded on contract, because there must have been an agreement express or implied by the tenant to hold, and as to the return to be made to the landlord; but it was also necessary that he under whom the tenant agreed to hold, should be either lord of the feud or owner of the reversion in order that the relation of landlord and tenant should be complete; and all that the section does is to render unnecessary hereafter the latter requisite, and to create the relation whenever, as it provides, there shall be an agreement to hold land from or under another "in consideration of any rent".

It will be also observed that the section does not in terms, or I think by necessary implication, assume to interfere with cases where, as in this, the true relation of landlord and tenant exists. I mean by that where the lands are held in consideration of a rent of one who had the immediate reversion in them, or the rights incident to that relation; but, as I have endeavoured to point out, does away with the necessity of the person to whom the rent is reserved, having the immediate reversion in the lands in respect of which it is payable, in order to the creation of that relation.

The 1896 version of the legislation was judicially considered in Kennedy v. Agricultural Development Board (1926) 59 O.L.R. 374. Rose J. held that despite the theory that a charge under the Land Titles Act would not pass legal title to the chargee, did not preclude the chargee from distraining under the attornment clause contained in the charge. He held that the effect of the opening words of the section "the relation of landlord and tenant shall not depend on tenure" to mean "that it is not essential to the relationship that the tenant shall hold from or under the landlord . . . (and) there is no reason why a person who has a title in fee simple cannot by agreement become tenant to another for a stipulated term." (see p.377)



NOTE: The rights and duties of a landlord and tenant respecting the fitness of premises for human habitation and the maintenance of premises may be significantly affected by legislation.

In certain circumstances, the medical officer or local board of health is authorized to require the owner or occupier of premises on which a nuisance exists to abate it and to execute such works and do such things as may be necessary for that purpose. (The Public Health Act, R.S.O. 1961, c. 82). Any house or part of a house "so overcrowded as to be injurious or dangerous to the health of the inmates" is deemed to be a nuisance within the meaning of the Act. (See *ibid.*, section 83(h).)

It also provides that where the owner or occupier of any premises in which a nuisance exists fails to abate it, the medical officer of health or sanitary inspector may enter the premises and take such steps as may be necessary to abate it. The costs of abating the nuisance are recoverable from both the owner and occupier for the time being of the premises. The occupier is authorized to deduct any money recovered or collected from him that, "as between him and the owner, the latter ought to pay" out of the rent. (See *ibid.*, section 92(1) - (4).)

The Act does not purport to allocate responsibility for the cost of abatement to either the owner or the occupant. It leaves the allocation to be made in accordance with the common law or by agreement between the owner and occupant. In the case of a lease, it is black letter law that absent an agreement to the contrary, a landlord has no obligation to repair enforceable by the tenant. This is so even if the tenant is not liable to the landlord for the particular items of disrepair. Accordingly, in such a case, if the tenant pays the costs of abatement under section 92 of the Act, there is authority that he will not be entitled to deduct it from the rent because it is not an amount which the landlord is obligated in law to the tenant to pay. (See *Perks v. Hammond*, [1948] O.W.N. 383.)

For a number of years, under the authority of Private Acts, the City of Toronto has had power to pass by-laws for fixing a standard of fitness for human habitation. (See S.O. 1936, c. 84, s. 6 and 7 as amended.) By-law 2255 is the most recent exercise of this power. It was enacted on July 12, 1965, and contains detailed standards dealing with the fitness of dwellings for human habitation.

In March, 1967, the Private Bills Committee of the Legislative Assembly reported an amendment to this legislation to the House. Under it, Toronto has petitioned for power to pass by-laws:

- (a) For providing standards for dwellings or any class or classes thereof within the municipality or within any defined area or areas and for prohibiting any person from using, permitting to be used, renting or offering to rent any such dwelling that does not conform to the standards;
- (b) For preventing the overcrowding of dwellings or any class or classes thereof within the municipality or within any defined area or areas thereof by limiting the number of persons who may inhabit a dwelling unit and who may use a room for sleeping purposes and for prohibiting any person from using, permitting to be used, renting or offering to rent any dwelling in violation thereof;



(c) For requiring the owner of any dwelling and to the extent that he is made responsible by the lease or agreement under which he occupies the property the occupant thereof to repair and maintain the dwelling in accordance with the standards or demolish the whole or any part of the dwelling . . .

The purpose of by-laws passed under such legislation is not only to bolster the provisions of the Public Health Act respecting fitness of dwellings for habitation but also to promote the conservation of dwellings and so inhibit urban blight.

The Planning Amendment Act, 1964 (S.O. 1964, c. 90, s. 4) authorizes municipalities generally to enact by-laws respecting the standards of maintenance and occupancy of residential properties, if there is in effect in the particular municipality an official plan which includes provisions relating to housing conditions. Like the proposed City of Toronto Act referred to above, a by-law passed under this legislation cannot allocate financial responsibility to the landlord or the tenant. The allocation will be effected either by the lease or by the common law.

In contradistinction, the English Housing Act (1936 (Imp.), c. 51, s. 2(1)) provides that in any contract for letting for human habitation a house at a rent not exceeding £40, in the case of a house situate in the administrative county of London and £26, in the case of a house situate elsewhere, there shall be implied a condition that the house is, at the commencement of the tenancy and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation.

